STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

[Appeal from the Opinion and Order entered by the trial court dated September 9, 2002]

IN THE MATTERS OF:

KIARA HERRON
KEANGELO LAGRONE
KEMARIA LAGRONE AND
KEJUAN JEFFERSON

_____/

MI SUP.CT. NO:
122666

Circuit Court
No. 98-613188 NA

APPELLANT/ LAWYER- GUARDIAN AD LITEM'S BRIEF ON APPEAL ON BEHALF OF THE MINOR CHILDREN

BY: WILLIAM LANSAT (P36752)
Appellant/ Lawyer-GAL for the minor children
255 S. Old Woodward, Suite 200
Birmingham, MI 48009
(248) 258-7074

TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED

CASES: PAGE

STATUTORY AUTHORITIES:

MICHIGAN COURT RULE PROVISIONS:

STATEMENT OF THE BASIS OF JURISDICTOIN

In an order dated September 25, 2003, this Honorable Court *granted* the Appellant's Application for Leave to Appeal pursuant to MCR 7.302

STATEMENT OF ISSUES PRESENTED

Whether a putative father has standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father?

Appellant answers "YES" in certain circumstances

The trial court answered "YES"

In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children?

Appellant states there is a legal significance to the trial court's finding.

The trial court also answered "affirmatively."

Whether the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act?

Appellant answers "YES"

The trial court answered "YES"

Given that MCR 3.921 (C)(2)(b) [formerly, MCR 5.921 (D)(2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act?

Appellant answers that the Putative father must file a complaint pursuant to the Paternity ACT.

The trial court answered "NO"

Whether *In re CAW* applies to this case?

Appellant answers "YES"

The trial court did not address the issue.

STATEMENT OF FACTS/PROCEEDING

On April 25, 2002, the Oakland County Family Court authorized a petition requesting termination of parental rights re: Kiara Herron, KeJuan Jefferson, KeAngelo LaGrone, and KeMaria LaGrone. [See contents of petition at APPELLANT'S APPENDIX, pages 10a-14a].

On May 8, 2002, the initial hearing was held in this matter. Putative father of Keangelo, Kejuan and Kemaria, Larry Lagrone, along with his court appointed counsel were present, along with counsel for putative father for Kiara, Frederick Herron. The Court initially indicated it would only proceed as to the legal father, Richard Jefferson. [APPELLANT'S APPENDIX, page 16a]. The Family Independence Agency {FIA} had scheduled a blood test for Mr. Lagrone; however, the court initially indicated that a positive finding would make no difference in this case due to the legal father. Pending that test, counsel for Mr. Lagrone argued to the court that the legal presumption of Mr. Jefferson's status can be "overturned." [APPELLANT'S APPENDIX, page 17a]. The Court ordered notice by publication on putative father Herron.

The parties appeared for the tentative Bench Trial scheduled for July 8, 2002. The Court proceeded to question Mr. Jefferson if he was married to mother as well as eliciting other information as to the status of the putative fathers. [APPELLANT'S APPENDIX, pages 18a- 19a].

The court found Mr. Jefferson was married to Mother at the time the children were born. The court indicated that unless this legal presumption is

challenged, Mr. Herron and Mr. Lagrone are not a part of this proceeding. However, counsel for putative father Lagrone asked the court to make a finding and determination pursuant to MCR 5.903(4) that Mr. Jefferson is not the natural father of the children. The court followed the provisions of MCR 5.903(4). It was based on those findings by the Referee, and affirmed by the Family Court Judge that resulted in the exclusion of the legal father in these proceedings. [APPELLANT'S APPENDIX, pages 20a-23a].

Counsel for Mr. Jefferson indicated that he is not the biological father of these children and does not wish to partake in these proceedings. Mr. Herron's counsel then asked for a blood test regarding putative father Herron. [APPELLANT'S APPENDIX, page 24a].

Judge Young heard oral arguments on Mr. Lagrone's written motion to determine that he is the legal father. [See content of Motion at APPELLANT'S APPENDIX, page 14a-15a].

The parties then appeared on September 25, 2002, for a bench trial. At that time, the Referee indicated that according to Judge Young's ruling [see APPELLANT'S APPENDIX, pages 4a-8a] Mr. Lagrone is the legal father to Keangelo, Kemaria, and Kejuan. The court then advised Mr. Herron to establish paternity within fourteen (14) days or loose all rights to the child. [APPELLANT'S APPENDIX, page 25a] Due to Mother's illness, the trial was re-scheduled, but never concluded due to this appeal and the STAY.

In an opinion and order dated September 9, 2002, Judge Young granted the Motion to Determine Legal Father. [See APPELLANT'S APPENDIX, at pages 4a-8a].

On September 25, 2002, Judge Young heard arguments on Appellant's/Lawyer/GAL's emergency Motion for authority to seek an application for leave to appeal and for certification by the trial court for immediate resolution by the Court of Appeals. The motion was granted for the reasons set forth on the record. [See APPELLANT'S APPENDIX, page 9a].

In an order dated September 25, 2002, this court directed the parties to address the following issues:

> By order of December 26, 2002, the application for leave to appeal was held in abeyance pending the decision in In re CAW (Docket No. 122790). On order of the Court, the opinion having been issued on July 23, 2003, 469 Mich 192 (2003), the application for leave to appeal from the November 1, 2002, decision of the Court of Appeals is again considered and it is GRANTED, limited to the following issues: 1) Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father? 2) In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children? 3) Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act? 4) Given that MCR 3.921(C)(2)(b) [formerly, MCR 5.921 (D92)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act? 5) Does In re CAW apply to this case?

ISSUE 1

DOES A PUTATIVE FATHER HAVE STANDING IN A JUVENILE CODE CHILD PROTECTIVE PROCEEDING TO REQUEST A PATERNITY DETERMINATION WHERE THE SUBJECT CHILDREN ALREADY HAVE A LEGAL FATHER?

Standard of Review: Questions of law are reviewed *de novo.* People v. Stevens, 460 Mich 626; 597 Nw2d 53 (1999). This will be the same standard of review for all questions posed by this Honorable Court.

It is unclear whether and under what circumstances a putative father has standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father. Neither the Juvenile Code, the court rules nor the applicable case law provide a definitive answer on this issue. The question presented by this Honorable Court seems to invite a broader inquiry over and above what is already permitted under the existing case law and court rules. That is, notwithstanding the ability of the family court in a child protective proceeding to determine that a child is not the issue of a marriage, should that inquiry even be *permissible* once there is a legal father? It would seem plausible to argue that if no one is disputing who the biological father is, and the legal father is not interested in planning for the child, the *best interests* of the child would be served by allowing such standing. However, it would not serve the youngsters *best interests* to invade the sanctity of a marriage which produced a loving and caring legal father who is not also the biological

father. However, the court rules as written do not make such a distinction, nor do they allow for such a legal father to object to the findings allowable under the court rules, as discussed *infra.*

The Juvenile Code is silent on the issue of putative fathers and does not expressly bestow upon the trial court the authority to determine paternity based on the Juvenile court rules in a child protective proceeding.

With respect to the court rules, under MCR 3.903(A)(23), a "putative father" is defined as "a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)." A "father" is defined under MCR 3.903(A)(7) in pertinent part as:

> (a) A man married to the mother at any time from a minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;
>
> (b) A man who legally adopts the minor;
>
> (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;
>
> (d) A man judicially determined to have parental rights; or
>
> (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001, *et seq.*, or a previously applicable procedure. For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment . . .

MCR 3.903(A)(7).

Pursuant to MCR 3.921, which controls intervention in a child protective proceeding,[1] the trial court has the discretion to make a two-part finding: (1) that

[1] See In re CAW, 469 Mich 192; 665 NW2d 475 (2003), discussed *infra.*

a preponderance of the evidence establishes that the putative father is the natural father of the minor, and (2) that justice requires that the putative father be allowed 14 days to "establish his relationship according to MCR 3.903(A)(7)."

As discussed in Section IV, *infra*, under a plain reading of MCR 3.921, a putative father does not have standing in a child protective proceeding to request a paternity determination. Rather, where a preponderance of the evidence establishes that the putative father is the biological father of the minor, the putative father must "establish" his relationship by commencing a paternity action and obtaining a judgment of paternity [MCR 3.903(A)(7)(c)] or by completing and filing an acknowledgment of parentage signed by the putative father and the mother [MCR 3.903(A)(7)(e)].

The current version of MCR 3.921 went into effect on May 1, 2003. Prior to that date, the Court of Appeals had held on at least two occasions that a trial court has the authority to make a determination of paternity in a child protective proceeding. See In re Montgomery, 185 Mich App 341 (1990) and In re CAW, 253 Mich App. 629, 636-637, *rev'd* 469 Mich 192; 665 NW2d 475 (2003). In In re CAW, the Court of Appeals observed that the probate court in Montgomery "made a determination of paternity during a neglect proceeding" by dismissing the legal father and finding that another individual was the child's biological father. 253 Mich App. 629, 636-637 (2003). The Court of Appeals held that, reading MCR 5.921 in conjunction with MCR 5.903 under the authority of Montgomery, "during child protective proceedings, the court can determine the

child to be born out of wedlock and then take appropriate steps to determine the identity and rights of the biological father." 253 Mich App. at 637-638.

The trial court in the case at bar reached a similar conclusion as the Court of Appeals, finding that Montgomery suggests that a trial court has the authority under [former] MCR 5.903(A)(4)(a) [now incorporated into MCR 3.903(A)(7)(a)] to make a finding of paternity in a child protective proceeding. [APPELLANT'S APPENDIX, page 4a]. In this case, as in Montgomery, it is undisputed that the legal father was not the biological father of the subject child and that the legal father wanted nothing to do with the children or the proceeding. [See APPELLANT'S APPENDIX, page 24a], 185 Mich App. at 343.

Although this Court reversed the Court of Appeals' decision in In re CAW, the majority opinion did not address Montgomery, nor did the opinion resolve the question of whether a trial court can make a determination of paternity in a child protective proceeding. Consequently, it is arguable that the Montgomery rule is still good law.

Moreover, a recent decision of the Court of Appeals casts a further cloud over this issue. In Kaiser v. Schnieder, 2003 WL 22084737 (Mich App. No. 244428, September 9, 2003), the Court of Appeals found that a mother's admission that the plaintiff father is the biological father was sufficient to confer standing to the father under the Child Custody Act. Kaiser distinguished Girard v. Wagenmaker, 437 Mich. 231 (1991) on the basis of whether paternity was in dispute:

> . . . we believe that the holding in *Pizana* and *Girard* is that, *where the child's parentage is disputed,* that dispute must first be resolved

> under the Paternity Act and then, assuming a resolution favorable to the father, the parties may proceed to resolve the custody issues under the custody act.

Kaiser, ___ Mich App. at ___; 2003 WL 22084737. (Emphasis in original).

Although Kaiser involved the custody act rather than a child protective proceeding, it is arguable that the reasoning employed in that case could apply to a situation such as the instant case, where it is undisputed that the putative father is the biological father. Applying the reasoning of Kaiser, a putative father would have standing to request a paternity determination in a child protective proceeding where the child's parentage was not in dispute.

Thus, this GAL submits that it is unclear whether and under what circumstances a putative father has standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father. This issue is ripe for appellate resolution in the instant case.

ISSUE 2

IN THIS CASE, WHAT IS THE LEGAL SIGNIFICANCE OF THE TRIAL COURT'S FINDING THAT THE PUTATIVE FATHER IS THE BIOLOGICAL FATHER OF THREE OF THE CHILDREN?

The legal significance of the trial court's determination in this case that the putative father is the biological father of three of the children is twofold: (1) the putative father was conferred standing to commence a paternity action, and (2) the putative father was conferred standing to intervene in the child protective proceeding.

As held by this Court in Girard v. Wagenmaker, 437 Mich. 231, 235 (1991), through the Paternity Act, "the Legislature did not express an intention to grant a putative father standing to establish the paternity of a child born while the mother was legally married to another man without a prior determination that the mother's husband is not the father." (Emphasis added). The trial court's finding in this case constituted the "prior determination" necessary to confer standing to Respondent Larry Lagrone to commence a paternity action under MCL 722.714(7).

As held by this Court in In re CAW, 469 Mich 192; 665 NW2d 475, 479 (2003), intervention in a child protective proceeding is controlled by MCR 5.921(D). The Court observed that "[t]his court rule states that a putative father is entitled to participate only '[i]f, at any time during the pendency of the proceeding, the court determines that the minor has no father as defined in MCR

5.903(A)(4)...'"[2] Under the definition found in MCR 3.903(A)(7)(a), a minor has no "father" if "a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage". The trial court's finding in this case constituted the "determination" necessary to confer standing to Respondent Larry Lagrone to intervene in the child protective proceeding.

[2] MCR 5.921(D) was replaced by MCR 3.921(D) effective May 1, 2003. The pertinent language from the quoted passage has not changed.

ISSUE 3

DO THE JUVENILE COURT RULES PROVIDE GREATER STANDING TO A PUTATIVE FATHER THAN IS PROVIDED BY THE PATERNITY ACT?

It would appear from the case law and the facts of the instant case that the court rules provide greater standing to a putative father than is provided by the Paternity Act.

Courts have narrowly construed Michigan's Paternity Act to require a putative father to meet certain, stringent requirements in order to have standing to establish paternity. In order to properly establish standing under the Paternity Act, a putative father must plead one of the following two categories: (a) the child is born to a woman who was not married from the conception to the child's date of birth, or (b) it has been determined by the circuit court that the child was born or conceived during a marriage but is not the issue of that marriage. MCL 722.711(1)(a).

In Girard v. Wagenmaker, 437 Mich. 231, 246 (1991), this Court held that under the plain terms of the Paternity Act, a putative father did not have standing "to establish paternity of a child born while the mother was legally married to another man without a prior determination that the mother's husband is not the father." 437 Mich. At 235.[3] As noted by Justice Weaver in her concurring

[3] As recently noted by a panel of the Court of Appeals in Kaiser v. Schreiber, 2003 WL 22084737 (Mich App. No. 244428, September 9, 2003), although the majority in In re CAW did not specifically consider the Girard case, its reasoning was essentially the same as in Girard, and In re CAW indicated that a majority of the justices still subscribe to the reasoning in Girard. The Kaiser panel observed that although the Paternity Act has been amended subsequent to the Girard decision, "those amendments to not appear to supply a basis for concluding that the Girard rule is no longer applicable." Id.

opinion in In re CAW, this Court in Girard grounded its literal reading of the paternity statute in the fact that it comported with "the traditional preference for respecting the presumed legitimacy of children born during marriage." In re CAW, 469 Mich. at ___; 665 NW2d at 480 (Weaver, J., concurring), citing Girard, *supra* at 246, citing Serafin, 401 Mich. at 636. Justice Weaver further observed that the use of the past tense of the verb "to determine" in MCR 5.903 (now MCR 3.903), rather than the present perfect tense, makes clear the fact that the determination that a child is born out of wedlock must be made by the court *before* a putative father may be accorded standing in a child protective proceeding. In re CAW, *supra* (emphasis in original).

By comparison, the court rules provide considerably more standing to a putative father. In In re CAW, this Court held that MCR 5.921(D) controls a putative father's standing to intervene in a child protective proceeding. 469 Mich. at ___; 665 NW2d at 478-479. The Court observed that under the rule, a putative father is entitled to participate if at any time during the pendency of the proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). *Id.* (Emphasis added).

The trial court's decision in the case at bar confirms the discrepancy between the Paternity Act and the court rules. The trial court held that while Respondent Larry Lagrone did not have standing not under the Paternity Act, he did have standing under the court rules.

The trial court first determined that Respondent Larry Lagrone is not a "father" under the Paternity Act, because he neither plead that the mother is

unmarried, nor was there a prior determination by a court that a child born during the marriage is not the child of the legal father, Richard Alan Jefferson. Consequently, the Respondent did not have standing under the Paternity Act. Conversely, although the minor children at issue were born during the lawful marriage of Tina Jefferson to Richard Jefferson, the trial court found that Larry Lagrone is the biological father and that the children were not the issue of the marriage between Tina Jefferson and Richard Jefferson and that therefore he has standing to bring a motion for a determination of paternity under In re Montgomery, 185 Mich App 341 (1990).

The trial court interpreted Montgomery as holding that a putative father who does not have standing in a paternity action has standing in a neglect proceeding, provided the court determines that he is the biological father. (APPELLANT'S APPENDIX, page 4a). The trial court indicated that it was "troubled" by Montgomery because it creates an inconsistency with the line of cases decided under the Paternity Act. *Id.* While acknowledging that it was bound by the controlling case law, the trial court declared that "[a] putative father should have no better position in a neglect proceeding than he enjoys where no neglect proceeding exists." *Id.*

It is worth noting Justice Kelly's concurring opinion in In re CAW, in which she observed that the text of MCR 5.921 (now MCR 3.921) does not explicitly address standing to intervene. Rather, it designates the persons who must be given notice before child protective proceedings can go forward. 469 Mich. at ___; 665 NW2d at 481 (Kelly, J., concurring). This begs the question: how can

the court rules provide any greater standing to putative fathers than the Paternity Act when the court rules fail to specifically address standing?

Accordingly, to the extent that it was not this Court's intention that the court rules provide greater standing to a putative father than the Paternity Act, clarification of the court rules and the case law is necessary, particularly in light of the May 1, 2003 revisions to the court rules. The uncertainty surrounding putative fathers might be resolved through the creation of a new court rule.

ISSUE 4

GIVEN THAT MCR 3.921(C)(2)(B) [FORMERLY MCR 5.921(D(2)(B)] AUTHORIZES A FAMILY DIVISION JUDGE TO DETERMINE THAT A PUTATIVE FATHER IS THE CHILD'S "NATURAL" FATHER, DOES THE RULE AUTHORIZE THAT JUDGE TO DETERMINE THAT THE PUTATIVE FATHER IS THE LEGAL FATHER OR MUST THE PUTATIVE FATHER FILE A COMPLAINT PURSUANT TO THE PATERNITY ACT?

Under a plain reading of MCR 3.921(C)(2)(b), the rule does not authorize a family division judge to determine that the putative father is the legal father. MCR 3.921 designates the persons who must be given notice before child protective proceedings can go forward. MCR 3.921(C), which addresses the notice to be provided to putative fathers, states in relevant part as follows:

> (C) Putative Fathers. If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule.
>
> * * *
>
> (2) After notice to the putative father as provided in subrule (C)(1), the court may conduct a hearing and determine, as appropriate, that:
>
> * * *
>
> (b) a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 3.903(A)(7). The court may extend the time for good cause shown.

Accordingly, in order to have the discretion to determine that a putative father is the child's "natural" father as set forth in MCR 3.921(C)(2)(b), a family division judge must first determine that the minor has no "father" as defined in

MCR 3.903(A)(7). Once this determination has been made, it is up to the putative father to "establish" his relationship with the child according to MCR 3.903(A)(7), meaning that the putative father must establish his paternity by commencing a paternity action and obtaining a judgment of paternity [MCR 3.903(A)(7)(c)] or by completing and filing an acknowledgment of parentage signed by the putative father and the mother [MCR 3.903(A)(7)(e)].

In summary, there is nothing in Rule 3.921(C) that authorizes a family division judge to determine that the putative father is the legal father. Moreover, the Montgomery case does not explicitly state that either; rather, by implication and judicial interpretation. To be sure, under a plain reading of the court rule, the putative father must file a complaint pursuant to the Paternity Act in order to establish his relationship as the child's "father" before he may judicially be declared to be the legal father. This makes sense from a policy standpoint. Juvenile proceedings do not address issues of support, etc. Further, the proceedings are not kept open for the life of a youngster (assuming no termination, and even then, the matter proceeds to finalization) as in a paternity file, where the circuit court maintains jurisdiction on the case until the child reaches eighteen (18) years of age.

Despite the plain language of MCR 3.921, however, this GAL submits that clarification of the issue is warranted in this case, given the unresolved precedential value of Montgomery, discussed in Section I, *infra*, as well as the trial court's heavy reliance on Montgomery in the instant case. As noted above, this Court in its majority opinion reversing the Court of Appeals' decision in In re

CAW did not specifically address Montgomery. Clarification of this question is also warranted in light of the Court of Appeals' opinion in Kaiser, which distinguished Girard on the basis of whether paternity was in dispute. The Court of Appeals stated in Kaiser as follows:

> This conclusion is not inconsistent with our decision in *Pizana, supra,* and, by implication, with the Supreme Court's decision in *Girard, supra.* Both those cases involved situations where parentage was disputed, not admitted. To require under the Paternity Act to establish parentage is undisputed would constitute a waste of judicial resources. More importantly, it would impose a requirement under the custody act that simply does not exist. Nowhere in the custody act is there a requirement that parentage be established first under the Paternity Act even if parentage is undisputed. We do not believe that this Court in *Pizana* or the Supreme Court in *Girard* was endeavoring to rewrite the custody act to impose a requirement of first seeking relief under the Paternity Act where the parties were not married to each other and they do not disagree regarding the child's parentage. Rather, we believe that the holding in *Pizana* and *Girard* is that, *where the child's parentage is disputed,* that dispute must first be resolved under the Paternity Act and then, assuming a resolution favorable to the father, the parties may proceed to resolve the custody issues under the custody act.

Kaiser, ___ Mich App. at ___; 2003 WL 22084737. (Emphasis in original).[4]

In summary, this GAL believes that the court rules do not confer authority on a family court judge to determine that the putative father is the child's legal father, but the issue warrants clarification by this Court.

[4] As noted in Kaiser, Girard relied on Pizana v. Jones, 127 Mich App 123, 127 (1983) for the proposition that "a proper action to determine paternity should be brought under and governed by the provisions of the Paternity Act." Girard, *supra* at 251. Significantly, however, although the Pizana court stated that a determination of paternity should be litigated under the Paternity Act, it upheld the trial court's determination of paternity expressly made under the Child Custody Act.

ISSUE 5

DOES *IN RE CAW* APPLY TO THIS CASE?

There can be no question that In re CAW applies to this case. As in the instant matter, In re CAW considered the issue of whether a putative father has standing to intervene in a child protective proceeding under the juvenile code in which the subject child has a legal father, concluding that had the requirements of the court rule been met, the putative father would have standing. 665 NW2d at 478. However, since the requirements were never followed, unlike the instant case at bar, the putative father could not claim 'standing.' Moreover, unlike this case, the putative father in CAW sought to intervene *post termination.*

Justice Kelly wrote separately, concurring in part and dissenting in part. Although she agreed with the result reached by the majority, she disagreed with their reliance on MCR 5.921 (D) along with the majority's reliance on the policies behind the Paternity Act. She noted the differences between the two acts: one being for support, the other, the termination proceeding for placement of children in the most family like setting. She noted that the "rigid application" of the presumption of legitimacy would prevent a court from placing a child with a putative father. This position has merit. She further argued for a court rule to specifically address the issue of standing if the putative father can raise a legitimate issue of paternity. Her reasoning would appear to allow such an individual an independent ability to come forward in a child protective proceeding as opposed to the current rules which basically are triggered upon the court's

own motion, if you will. Justice Kelly, however, did not address at what point would intervention be disallowed? Would such a rule allow for standing when the child is already in a prospective adoptive home and has significant ties with that family? Would that be in the child's *best interest?*

Justice Cavanagh dissented and argued that the Legislature intended to allow putative fathers the ability to intervene. Further, he reasoned that neither the court rules nor statutes "compel" the conclusion that a putative father must first establish paternity in a separate legal proceeding.

In re CAW does not fully resolve the instant case, because In re CAW does not definitively answer the question of whether the rule of Montgomery remains good law, as set forth above. Moreover, In re CAW is distinguishable from the case at bar. Unlike the instant case, no finding was ever made by the trial court in In re CAW that the subject child was not the issue of the marriage. 665 NW2d at 479.

RELIEF REQUESTED

Undersigned counsel sought this instant appeal in hopes the matter would be resolved, one way or the other. Wherefore, the GAL requests that the opinion and order of the Family Court Judge allowing a determination of the legal father in a neglect proceeding be *reversed.* Further, that the Court Rules be amended to clarify under what circumstances putative fathers have standing to request a paternity determination when there is a legal father, if at all.

Respectfully Submitted,

William Lansat

Dated: 10-19-03